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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, *et al.*, *Petitioners,*

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting Writ	7
Conclusion	20

Appendix A—Statutes	1a
Appendix B—Opinion and Judgment of the United States District Court for the Northern District of Ohio, Western Division	7a
Appendix C—Opinion and Judgment of the Court of Appeals, Sixth Circuit	27a

CITATIONS

CASES:

Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana R.R. Co., 353 U.S. —, 1 L. ed. 2d 622 (1957)	18
Brotherhood of Railroad Trainmen, et al. v. Toledo, Peoria & Western Railroad Co., 321 U.S. 50 (1944)	8, 17, 20
Dorchy v. Kansas, 272 U.S. 306, 71 L. ed. 248, 47 S. Ct. 86	11
Diamond Full Fashion Hosiery Co. v. Leader, 20 F. Supp. 467 (D.C.E.D.Pa. 1937)	14
East Texas Motor Freight Lines v. International Brotherhood of Teamsters, 163 F. 2d 10 (C.A. 5, 1947)	16
Gully v. First National Bank, 299 U.S. 109 (1936)	16
Hunt v. Crumboch, 325 U.S. 821 (1945)	11

Page

Lee Way Motor Freight, Inc. v. Keystone Freight Lines, 126 F. 2d 931 (C.A. 10, 1942), cert. den. 317 U.S. 645 (1942) 16
Manion v. Kansas City Terminal Co., 353 U.S. —, 1 L. ed. 2d 722 (1957) 15, 18
Milk Wagon Drivers' Union Local 753 v. Lake Valley Farm Products, 311 U.S. 91 (1940) 13
Montgomery Ward & Co. v. Consolidated Freightways, 42 M.C.C. 225 (1943) 16
New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) 14
Toledo, Peoria & Western Railroad Co. v. Brotherhood of Railroad Trainmen, 132 F. 2d 265 8
United Electrical Coal Companies v. Rice, 80 F. 2d 1 (C.A. 7, 1935) 13
United States v. American Federation of Musicians, 47 F. Supp. 304 (1942), aff'd 318 U.S. 740 (1943) 12
United States v. Carrozo, 37 F. Supp. 191 (D.C. Ill., 1941) 12
United States v. Hutcheson, 312 U.S. 219 (1941) 12
United States v. International Hodcarriers, et al., 313 U.S. 539 (1941) 12

STATUTES:

Federal Declaratory Judgment Act [28 U.S.C. 2201 and 2202] 4

Interstate Commerce Act [49 U.S.C. 1, et seq.] ... 4, 7, 15
Section 1 3
Section 1(4) 16

Judicial Code [28 U.S.C. 1, et seq.]
Section 1254(1) 2

Norris-LaGuardia Act [29 U.S.C. 113 et seq.] 4, 7, 9, 10, 11, 13, 14, 18
Section 4 3
Section 14(a) 3

Railway Labor Act [45 U.S.C. 151 et seq.] 4, 6, 7, 9, 10, 11, 17
Section 2 3
Section 2, First 10

Page

Section 3 ..... 3, 6, 11, 19
Section 5 3
Section 5, First 5
Section 5, First (b) 6, 10, 19
Section 6 ..... 3, 15
Section 7 3
Section 10 3

MISCELLANEOUS:

United States Constitution 8
Fifth Amendment 4

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THE NEW YORK CENTRAL RAILROAD COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on June 14, 1957.

* Petitioners are international railway labor organizations and are affiliates of the Railway Labor Executives' Association, an organization consisting of twenty-two of the twenty-three standard national and international railway labor organizations. This Association, by official action of its constituent members, has authorized Petitioners to state that it desires to support the petition for certiorari and will request the Court for permission to participate as *amicus curiae* if the writ is granted.

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Northern District of Ohio, Western Division, printed as Appendix B hereto, *infra*, p. 7A, is reported at 140 F. Supp. 273. The opinion of the Court of Appeals is unreported and is printed as Appendix C hereto, *infra*, p. 27A.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1957, and is printed in Appendix C, *infra*, p. 42A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The judgment of the Court of Appeals raises the following questions:

1. Does a United States District Court have jurisdiction over the subject matter of a complaint in which a railroad seeks to enjoin a threatened strike by its employees when the asserted right of the plaintiff to such relief does not flow out of the United States Constitution or a statute enacted pursuant thereto, and jurisdiction is predicated solely on the basis of the duties imposed upon carriers by the Interstate Commerce Act?

2. Do railroad employees have a right to strike for the purpose of preventing carrier action which (a) would cause the abolition of their jobs, (b) would ad-

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[1] The opinion of the Court of Appeals follows R. 226 which refers to the pages of the printed Joint Appendix of the record before the Court of Appeals filed in accordance with Rule 21, Par. 3. References to pages of the opinion appear in this petition as Op. 1 through 12.

versely affect their working conditions through loss of seniority and priority right to designated work, and (c) would result in the unilateral disruption of agreements with the railroad for the performance of yard work in a terminal area and the allocation of seniority between the railroad's freight yards in that area?

3. Does the Norris-LaGuardia Act prohibit a United States District Court from enjoining a threatened strike against a railroad by its employees under circumstances where the employees have complied with all applicable provisions of the Railway Labor Act and the purpose of the strike is the objectives set forth in paragraph 2 above?

4. Does a United States District Court have authority to enjoin a threatened strike against a railroad by its employees when the railroad has available to it the procedures of the Railway Labor Act for the settlement of the dispute giving rise to the strike threat and has refused to avail itself of those procedures?

STATUTES INVOLVED

The statutory provisions involved are Sections 2, 3, 5, 6, 7, and 10 of the Railway Labor Act [45 U.S.C. 152, 153, 155, 156, 157, and 160]; Section 1(4) of the Interstate Commerce Act [49 U.S.C. 1(4)]; and Section 4 and 14(a) of the Norris-LaGuardia Act [29 U.S.C. 113(a)]. These provisions are printed in Appendix A, *infra*, p. 1A.

STATEMENT

This litigation began when The New York Central Railroad Company (hereinafter referred to as the "New York Central") on January 26, 1956, filed a complaint in the District Court asking for a declaratory

judgment finding that the petitioning railway labor organizations and certain named officers of said organizations, who were the duly certified representatives under the Railway Labor Act [45 U.S.C. 151 et seq.] of certain of the railroad's employees, had no right to call a strike to prevent the closing of the carrier's North Toledo Yard and for the issuance of a permanent injunction against such a strike (R. 7-19). The complaint alleged that the District Court had jurisdiction of the suit because it arose under the laws of the United States regulating commerce and the Fifth Amendment of the Constitution (R. 9). The only federal statutes cited in connection with this allegation were the Federal Declaratory Judgment Act [28 U.S.C. 2201 and 2202] and Interstate Commerce Act [49 U.S.C. 1 et seq.].[2] The complaint also alleged that the threatened strike would invade property rights of the railroad and was illegal (R. 25).

The petitioners filed an answer to the complaint which denied that the sole purpose of the threatened strike was to prevent the closing of the North Toledo Yard (R. 25) or that it would invade any property right or other legally protected right of the railroad (R. 25). The answer also denied that the railroad had exhausted its available administrative remedies (R. 25) and set up the affirmative defense that the railroad's request for injunctive relief was barred by the provisions of the Norris-LaGuardia Act (R. 27).

The threatened strike arose out of a dispute between the New York Central and the petitioners which began on June 7, 1955, when the railroad advised its employees that it would shut down the carrier's North

[2] R. 17.

Toledo Yard, one of three freight yards in the Toledo area, effective July 10, 1955 (R. 10, 21, 51, 151). The petitioners objected thereto and asked the railroad to confer with the two organizations on such closing and the problems connected therewith. The New York Central did hold two meetings on June 11, 1955, and July 7, 1955, at which the management explained its position and the employees voiced their objections (R. 51, 200-226). At these meetings the employee representatives explained that the closing of the yard would result in the loss of jobs, would adversely affect the working conditions of the employees engaged in such work by destroying their seniority rights in the Toledo terminal area, and would unilaterally abrogate long-standing agreements between the two Brotherhoods and the railroad for the performance of yard work in said area (R. 42, 70-72, 80, 206, 216, 223, 224). The railroad refused to negotiate with respect to the matter on the ground that the decision to close the yard was an absolute prerogative of management with which the employees were not properly concerned regardless of the effects upon them or their agreements (R. 42, 70-72, 80, 206, 216, 223, 224).

The petitioning Brotherhoods therefore made formal application to the National Mediation Board for compulsory mediation of the dispute pursuant to Section 5, First, of the Railway Labor Act [45 U.S.C. 155, First] (R. 166-170, 190). Under Section 6 of that statute [45 U.S.C. 156], the railroad was required to maintain the *status quo* until the controversy had been acted upon by the Mediation Board. On August 1, 1955, the Mediation Board advised the parties that it could not compel mediation because there was no specific contract between the railroad and the two Broth-

erhoods for continued operation of the North Toledo Yard and the Brotherhoods had not requested the execution of such an agreement. The Board also suggested the possible use of National Adjustment Board machinery under Section 3 of the Railway Labor Act [45 U.S.C. 153] for settlement of any claims of violations of existing agreements (R. 158).

The New York Central then re-scheduled the closing of the North Toledo Yard for August 7, 1955 (R. 159). The two Brotherhoods gave notice of a strike against the western division of the railroad (R. 159, 171, 172), and the National Mediation Board proffered its services under Section 5, First (b) of the Railway Labor Act [45 U.S.C. 5, First (b)]. These services were accepted by the unions and the railroad (R. 159, 160, 172). The railroad then postponed the closing of the yard, as it was required to do by the Railway Labor Act (R. 160, 161).

The National Mediation Board thereafter made unsuccessful efforts to settle the dispute but reported to the employees that "in all instances the carrier refused to negotiate" (R. 148). Therefore, on December 14, 1955, the Mediation Board relinquished jurisdiction of the dispute (R. 161, 162). The railroad rescheduled the closing of the North Toledo yard for January 21, 1956, and the Brotherhoods called a strike against the western division of the carrier (R. 162).

The District Court issued an *ex parte* restraining order against the strike which continued in effect during the proceedings before the court (R. 35). That court on May 1, 1956, issued its opinion holding that the New York Central was entitled to the relief requested in its complaint (R. 30-48), and on June 4,

1936, entered an injunction permanently enjoining the petitioners from conducting any strike, work stoppage, or any other act of economic coercion to keep or prevent the railroad from closing the North Toledo Yard (R. 39-60). On appeal, the majority of the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, holding (1) that the District Court had jurisdiction over the subject matter of the complaint; (2) that the employees did not have a right to conduct the threatened strike since their controversy with the railroad did not involve a labor dispute within the intent of the Railway Labor Act; (3) that the Norris-LaGuardia Act did not prohibit the granting of an injunction to prevent the strike; and (4) that the railroad did not have available administrative remedies under the Railway Labor Act to settle its dispute with the employees (Op. 1-12). Circuit Judge Stewart dissented on the ground that the District Court did not have jurisdiction of the subject matter of the complaint (Op. 12).

REASONS FOR GRANTING WRIT

1. The present petition raises important questions which should be resolved by this Court concerning jurisdiction of the federal courts, the right of railroad employees to strike, the application of the Norris-LaGuardia Act, and the necessity of a railroad exhausting the procedures under the Railway Labor Act as a condition precedent to injunctive relief.

A. *Jurisdictional Issue.* The Court of Appeals held that the District Court had jurisdiction over the subject matter of the complaint because of the duties imposed upon railroads by the Interstate Commerce Act to furnish facilities for passengers or freight, and

to engage in interstate commerce in the service of the public (Op. 10, Op. 7-12). The majority relied upon *Toledo, Peoria & Western Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 132 F. 2d 265, as precedent for this holding. Circuit Judge Stewart dissented from such holding on the ground that the controversy did not arise under the United States Constitution and "I cannot perceive that it arises under the laws of the United States." He cited in support of his views the dissenting opinion of then Circuit Judge Minton in the *Toledo, Peoria & Western* case (Op. 12).

These conflicting views with respect to the jurisdiction of federal courts have not been heretofore resolved by this Court. The issue came before the Court in its review of the *Toledo, Peoria & Western* case but was not determined since the Court reversed the decision of the Court of Appeals for the Seventh Circuit sustaining an injunction issued against a railway labor organization because the railroad plaintiff had failed to make every reasonable effort to settle the dispute. *Brotherhood of Railroad Trainmen, et al.* v. *Toledo, Peoria & Western Railroad Co.*, 321 U.S. 50 (1944). The Court stated that in view of such disposition of the case, it had not determined the other issues which were presented. The Court observed (p. 67) that:

> "Some are of such importance they should not be decided in advance of necessity for determining them. That necessity is not present in this case. Accordingly, we express no opinion concerning those issues."

These issues included the jurisdictional question with which we are here concerned. Thus the importance of the issue has been recognized by the Court.

B. *Right of the Employees to Strike.* The Court of Appeals held that the threatened strike did not have a valid purpose because the unions were not seeking to exercise any labor rights against the railroad (Op. 4). The Court reached this conclusion by divorcing, as had the District Court, the effects of the closing of the yard upon the employees and their agreements from the physical act of terminating yard operations. It held that a strike to prevent the latter did not involve a legitimate labor dispute because it was unconnected with issues of representation, employment, or contractual rights. It also held that the controversy concerning the effect of the closing of the yard upon the employees was a separate and distinct problem which could be met when the time arrived (Op. 5). Neither the Court of Appeals nor the District Court was able to cite a single judicial precedent to support this treatment of the controversy and the conclusion reached. The holding not only is without precedent but, if allowed to stand, can seriously interfere with the right of railroad employees to rely upon economic self-help in situations where, as here, they have exhausted all remedies available to them under the Railway Labor Act. It is submitted that such a result should not be permitted without a review by this Court of the issue raised by the decision below.

C. *Application of the Norris-LaGuardia Act.* The Court of Appeals held that the Norris-LaGuardia Act did not prohibit the issuance of an injunction against the threatened strike since the controversy did not involve a labor dispute (Op. 5, 6). Here again neither the District Court nor the Court of Appeals cited a single decision of any court interpreting the Norris-LaGuardia Act to support this conclusion. Moreover,

the holding ignores the principle that has been well established in the interpretation of the Norris-LaGuardia Act that in the absence of fraud or violence, the purpose of a strike, the motives of the strikers, or the illegality of the strike are of no significance in determining the applicability of that statute. Here again the unprecedented nature of the holding of the court below and its narrowing of the scope of the Norris-LaGuardia Act to the detriment of railway employees clearly calls for a review of the issue raised by this Court.

D. *Failure to Exhaust Administrative Remedies.* The Court of Appeals held that the railroad was not required to exhaust the administrative remedies available under the Railway Labor Act as a condition precedent to obtaining injunctive relief because such remedies are available only in cases involving labor disputes, and the controversy in the present case did not involve a labor dispute within the meaning of the statute (Op. 5, 6). The court held that there were only two types of disputes under the Railway Labor Act, one of which grows out of a disagreement in the bargaining process for a new contract and the other of which involves a controversy over the meaning of an existing collective bargaining agreement in a particular fact situation (Op. 5). This conclusion was reached in spite of the clear language of Section 2, First of the Railway Labor Act [45 U.S.C. 152, First] which encompasses "all disputes," whether arising out of the application of existing agreements "or otherwise," and the provisions of Section 5, First (b) of that statute [45 U.S.C. 155, First (b)] which embraces disputes other than those involved in the making of a new collective

bargaining agreement and which are not referable to the National Railroad Adjustment Board. Moreover, the Court of Appeals held that there was no dispute referable to an Adjustment Board under Section 3 of the Railway Labor Act [45 U.S.C. 153], in spite of the fact that the record clearly shows that from the very beginning the railway labor organizations objected to the carrier's action because of its claimed effect upon their existing contracts (R. 42, 70-72, 80, 206, 216, 223, 234). Indeed, this formed in part the basis of their original invocation of Mediation Board services (R. 166-170, 194). Here again the holding of the court below was entirely unsupported by any judicial precedent. It is submitted that a decision of such impact with respect to the scope of the Railway Labor Act should not be permitted to stand without review by this Court.

2. The decision of the Court of Appeals is believed by petitioners to be contrary to and in conflict with the decisions of this Court concerning the right of railway labor employees to strike, the application of the Norris-LaGuardia Act, and the scope of the Railway Labor Act.

The decision holding that the strike was not for valid labor objectives is contrary to the decision of this Court in *Hunt* v. *Crumboch*, 325 U.S. 821 (1945) where the Court declared that Congress recognized an absolute right in employees to strike according to their own judgments (p. 825, f.n.1):

> "Dorchy v. Kansas, 272 U.S. 306, 311, 71 L. ed. 248, 269, 47 S. Ct. 86, cited here in dissent, has no relevancy to the issues before us. In that case Dorchy was convicted of calling a strike to enfore a state claim contrary to state law. He attacked

> the state law on the ground that the right to strike was guaranteed by the Fourteenth Amendment. This Court rejected Dorchy's constitutional contention with the statement that 'Neither the common law nor the Fourteenth Amendment confers the absolute right to strike.' The Court had no reason in the Dorchy Case to consider the Clayton Act, which as we decided in the Hutcheson Case does recognize an absolute right of employees to work or cease working according to their own judgments. That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations."

The decision is also contrary to the decision of this Court in *United States* v. *Hutcheson*, 312 U.S. 219 (1941), in which this Court stated (p. 232):

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness of wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

In addition, it is contrary to the decision in *United States* v. *Carrozo*, 37 F. Supp. 191 (D.C. Ill., 1941), sustained by this Court per curiam in *United States* v. *International Hodcarriers, et al.*, 313 U.S. 539 (1941), and the decision in *United States* v. *American Federation of Musicians*, 47 F. Supp. 304 (1942), affirmed by this Court per curiam in *United States* v. *American Federation of Musicians*, 318 U.S. 740 (1943). In the *Carrozo* case, the District Court involved made the following findings with respect to lawful activities of a labor organization:

> "Such normal, legitimate and lawful activities of a labor union include the calling of strikes, or threatening to call strikes, in order to enforce their demands, as in the present case a demand against the use of labor saving devices which will displace their members; or, in the alternative, the demand that if the labor saving device is used the same number of men be employed as would be if the other type of mixer were used. These are legitimate and lawful activities which a labor union is permitted to carry on in an effort to maintain employment and certain working conditions for its members, and any restraint of trade or commerce attendant thereon is only indirect and incidental."

In the present case, a strike to prevent the closing of the North Toledo Yard would have protected the job opportunities of the employees involved and would have prevented an adverse change in the working conditions of such employees. These objectives are clearly recognized as valid reasons for a strike in the cited cases. In contrast, the Court of Appeals was unable to cite any decision supporting its view (Op. 4, 5).

Petitioners also believe that the decision of the Court of Appeals with respect to the application of the Norris-LaGuardia Act is contrary to the decisions of this Court which make clear that such statute was intended to "drastically" curtail the jurisdiction of federal courts in the labor field and that the term "labor dispute" as used in that Act must be given a liberal interpretation in light of its purposes. *Milk Wagon Driver's Union Local 753* v. *Lake Valley Farm Products*, 311 U.S. 91 (1940)[3] In holding that the

[3] To the same effect is the decision of the United States Court of Appeals for the Seventh Circuit in *United Electrical Coal Companies* v. *Rice*, 80 F. 2d 1 (C.A. 7, 1935).

threatened strike did not arise out of a labor dispute within the meaning of the Norris-LaGuardia Act because of the purposes thereof, the decision below is directly contrary to that of this Court in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938), where the Court declared (pp. 559-560):

> "* * * The Court of Appeals thought that the dispute was not a labor dispute within the Norris-La-Guardia Act because it did not involve terms and conditions of employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous."

The petitioners also believe that the decision of the Court of Appeals with respect to the application of the Norris-LaGuardia Act was in direct conflict with the decision in *Diamond Full Fashion Hosiery Co.* v. *Leader*, 20 F. Supp. 467 (D.C.E.D., Pa. 1937), which was handed down by District Judge Maris, now on the Third Circuit, in which the court held that the Norris-LaGuardia Act prohibited it from enjoining a strike by the employees of the plant to prevent the shutting down of that plant and the transfer of its machinery for use in a business in another state. In holding the Norris-LaGuardia Act applicable to the situation, the Court declared (p. 469):

> "Does it involve a controversy concerning terms of conditions of employment? I think it does *Certainly the duration of employment is one of it*

most vital terms. Here the defendants had a union contract which was in force on August 6, and it was their contention that they had been locked out of their employment by the Vogue Company. I am satisfied from the evidence that their sole purpose in picketing the Vogue Mill was to endeavor to get their jobs back. All of the elements of a labor dispute were present. *Whether the defendants' position was justified or had any real basis is beside the point and is not for this court to pass upon. The fact remains that there was a dispute between the defendants and the Vogue Company and that it was a labor dispute."* (Emphasis supplied.)

The appeal from this decision of the Third Circuit was dismissed on agreement of counsel, 99 F. 2d 1001 (1937).

Finally, petitioners believe that the decision below is in conflict with the decision of this Court in *Manion* v. *Kansas City Terminal Ry. Co.*, 353 U.S. —, 1 L. ed 722, decided April 8, 1957, insofar as one of the purposes of the threatened strike was to prevent a claimed violation of their existing work agreements relating to seniority and allocation of work in the Toledo terminal area. In the *Manion* case this Court held that a railway labor organization could not be enjoined from striking over a dispute with a railroad concerning the interpretation of an agreement between the organization and the carrier where the plaintiff railroad had not made any effort to submit the dispute to the National Railroad Adjustment Board.

3. The decision of the Court of Appeals is erroneous.

The Court of Appeals sustained the jurisdiction of the District Court solely on the basis of the duty resting on the plaintiff under the Interstate Commerce

Act.[4] It is well established that in order for a federal question to arise in a suit, the facts set forth in the complaint must show that the plaintiff has a right flowing out of federal law to be vindicated by the relief requested. *Gully* v. *First National Bank*, 299 U.S. 109 (1936). The plaintiff asserted that it had such a right because if the strike took place, the railroad would be in violation of the provisions of Section 1(4) of the Interstate Commerce Act [49 U.S.C. 1(4)], which makes it the duty of every common carrier subject to the Act to provide and furnish transportation upon a reasonable request therefor. However, such an obligation does not establish a right flowing from a federal statute. If the decision of the Court of Appeals is right, then the federal courts have jurisdiction over every suit brought by a railroad or any other carrier subject to the Interstate Commerce Act growing out of a threatened strike regardless of the basis of the claimed relief. Moreover, the Interstate Commerce Commission, which is charged with the enforcement of the cited provision, has held that the duties imposed by that statute to provide service are conditional and are not violated by a carrier ceasing operations during a strike. *Montgomery Ward & Co.* v. *Consolidated Freightways*, 42 M.C.C. 225 (1943). The duties imposed on carriers under the Interstate Commerce Act have also been rejected by the courts as a basis to enlarge federal jurisdiction. *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines*, 126 F. 2d 931, 934 (C.A. 10, 1942), *cert. den.* 317 U.S. 645 (1942); *East Texas Motor Freight Lines* v. *International Brotherhood of Teamsters*, 163 F. 2d 10, 12 (C.A. 5, 1947). It is submitted that the dissent of then Circuit Judge Minton

[4] No question of diversity of citizenship was present.

in *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Ry Co.*, 132 F. 2d 265 (C.A. 7, 1942), which was adopted by Circuit Judge Stewart in this case, is a correct statement of the law and that there was no jurisdiction in the District Court to entertain the railroad's complaint.

The Court of Appeals held that the threatened strike was invalid although there is nothing in the Railway Labor Act prohibiting the exercise of the right to strike so long as a labor organization has complied with the procedural steps laid down in that Act to settle the dispute involved or unless the dispute is subject to Section 3 of the statute and is before an Adjustment Board. The court below did not find that either of these conditions was present. Yet it concluded that the strike was illegal since there was no labor dispute within the meaning of the Railway Labor Act (Op. 5, 6).[5] It is submitted that the decisions cited under Point 2 above clearly demonstrate that the objectives of the strike were legitimate, even if we accept the artificial splitting of the dispute into two parts so as to separate the effects of the railroad's action from the action itself. In addition, the petitioners urged before the Court of Appeals, and urge here, that it is entirely unrealistic to separate the action of the railroad in closing the North Toledo yard from the effects thereof on the employees involved. These effects include loss of job opportunities, changing of working conditions because of lack of seniority in other yards in the Toledo terminal area, and destruction of the underlying basis of the agreements covering yard work in that area. It is

[5] The term "labor dispute" is not found in the Railway Labor Act.

clear that the railway labor organizations involved were not threatening to strike just for the purpose of preventing the railroad from closing the yard but because of the adverse effects of such closing upon the employees represented by those organizations. The fact that one of those effects involves agreements between the organizations and the railroad does not mean that the dispute did not encompass such effect and that one purpose of the strike was not the protection of those agreements any more than it could properly be said that the dispute did not encompass the fact that jobs would be lost or that working conditions would be affected. When the purposes of the strike are considered as one integral package covering all of the union's objectives, we believe that those purposes were clearly valid and that they clearly involved a labor dispute within the meaning of the Norris-LaGuardia Act. Moreover, even if the controversy over the effect of the proposed closing of the yard upon the agreements between the railroad and the organizations is looked upon as a separate and distinct dispute, we do not perceive how it was possible for the Court of Appeals to hold that the Norris-LaGuardia Act was not applicable to that aspect of the dispute under the recent decision of this Court in *Manion* v. *Kansas City Terminal Ry. Co.*, 353 U.S. — (1957) 1 L. ed. 2d 722 in light of the fact that the railroad had not submitted the issue to a National Railroad Adjustment Board. In this connection, it should be observed that the Court of Appeals cited only the decision in *Brotherhood of Railroad Trainmen, et al.* v. *Chicago River & Indiana R.R. Co.*, 353 U.S. —, 1 L. ed. 2d 622, (1957) (Op. 5.), and did not cite the subsequent limiting *Manion* decision.

Finally, petitioners submit that the decision of the Court of Appeals holding that the railroad was not

required to exhaust the procedures available under the Railway Labor Act for settlement of the controversy prior to seeking an injunction because such procedures do not apply to the dispute involved, is also erroneous. As indicated above, page 10, Section 2 of the Railway Labor Act makes it a duty of all carriers to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions and "to settle *all* disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption of commerce or to the operation of any carrier . . ." (Emphasis supplied) The railroad refused to negotiate the dispute standing on a right not to do so (R. 42, 70-72, 80, 206, 216, 223, 224). Moreover, Section 5, First (b) provides that the services of the Mediation Board may be invoked in two types of cases. These are: (1) a dispute concerning changes in existing agreements concerning rates of pay, rules, or working conditions, (2) any other dispute not referable to a National Railroad Adjustment Board. It is the position of the petitioners that the present dispute at least clearly falls within the latter category. The Mediation Board did step in pursuant to said section and try to effect a settlement and the railroad refused to negotiate (R. 148). If the dispute was not encompassed by one of the above cited sections, then it had to be a dispute referable to a National Railroad Adjustment Board under Section 3 of the Railway Labor Act [45 U.S.C. 153] and the carrier, as a condition precedent to court relief, was required to submit the controversy to an Adjustment Board.

Finally, Section 5, First (b) requires the National Mediation Board to attempt to secure arbitration under Section 7 of any dispute in which its services have been invoked or proffered. The Mediation Board here

proffered its services and its efforts at mediation were unsuccessful. The railroad thereafter did not agree to submit the dispute to arbitration. The decision below therefore should have been governed by the decision of this Court in *Brotherhood of Railroad Trainmen, et al.* v. *Toledo, Peoria & Western Ry.*, 321 U.S. 50 (1944), and the injunction issued by the District court should have been vacated for failure of the railroad to make any effort to settle the dispute pursuant to the procedures of the Railway Labor Act.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Pertinent Provisions of Railway Labor Act

SEC. 2. [44 Stat. 577, as amended by 48 Stat. 1168, 45 U. S. C. 151a, 152] The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organzation to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

. . . . . .

SEC. 3 [44 Stat. 578, as amended by 48 Stat. 1189, 45 U. S. C. 153] First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act,[2] and it hereby provided—

. . . . . .

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act,[3] shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

. . . . . .

FUNCTIONS OF MEDIATION BOARD

SEC. 5 [44 Stat. 580, as amended by 48 Stat. 1195, 45 U. S. C. 155] First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

---

[2] Act approved June 21, 1934.

[3] Act approved June 21, 1934.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

. . . . . .

Sec. 6 [44 Stat. 582, as amended by 48 Stat. 1197, 45 U. S. C. 156] Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay,

rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case, where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

ARBITRATION

SEC. 7. [44 Stat. 582, as amended by 48 Stat. 1197, 45 U. S. C. 157] First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

* * * * * * * * * * *

EMERGENCY BOARD

SEC. 10. [44 Stat. 586, as amended by 48 Stat. 1197, 45 U. S. C. 160] If a dispute between a carrier and its employees be not adjusted under the foregoing provisions

of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

* * * * * * * * * * *

Pertinent Provisions of Interstate Commerce Act

SECTION 1(4) (49 U.S.C. 1(4):

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, . . .

Pertinent Provisions of the Norris-LaGuardia Act

SECTION 4 (29 U.S.C. 104):

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) ceasing or refusing to perform any work or to remain in any relation of employment;

* * * * * *

(g) advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) agreeing with other persons to do, or not to do any of the acts heretofore specified; and

(i) advising, urging or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

SECTION 13 (29 U.S.C. 113):

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of em-

ployees and one or more employees or associations of employees; or when the case involves any conflicting or competing interest in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

* * * * * *

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

No. 7493 Civil

Opinion of the Court

Filed May 1, 1956

The New York Central Railroad Company, Plaintiff,

vs.

Brotherhood of Railroad Trainmen, a Voluntary Association, et al., Defendants.

Kloeb, J.:

Plaintiff seeks to enjoin the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen and certain named officers of these Brotherhoods from conducting a strike because of the closing of the North Toledo Interchange Yard, and, in addition, asks for a declaratory judgment that such defendants have no right to interfere with the closing of the Yard.

For many years plaintiff has operated several yards in and around Toledo, and one of these is the North Tole-

do Yard, where it receives in interchange freight cars from a number of other railroads. Another of these yards is known as the Stanley Yard adjacent to Toledo and located in Wood County, Ohio.

On June 7, 1955, plaintiff gave notification to its employees that it would close its North Toledo Yard on July 10, 1955, and transfer the interchange point to the Stanley Yard.

On June 11, 1955, and on July 7, 1955, plaintiff's officials and certain officers of the defendants held meetings at which the closing of the North Toledo Yard and its effect on approximately thirty-five men there employed was discussed.

On July 7, 1955, defendants sent to the National Mediation Board an application for mediation services under the provisions of the Railway Labor Act and stated therein that the specific question in dispute was that management was arbitrarily closing the North Toledo Yard without negotiations. No request was made in the application for a change in any existing working agreements or for a new or supplemental agreement. On the same day, the Mediation Board wired plaintiff that they had received a telegram from defendants, reading as follows:

> "Serious situation existing New York Central Railroad Lines West at Toledo Ohio as the result of the management arbitrarily closing North Toledo Yard without negotiations request your Board take immediate jurisdiction over this matter and notify carrier to hold the matter status quo pending mediation proceedings. Letter follows." (Plaintiff's Exhibit 3).

On July 8, 1955, defendants filed an application for mediation services by way of a telegram (Defendants' Exhibit D), which read in part as follows:

> "Management, The New York Central Railroad Company, Lines West of Buffalo, advised Local Chairmen, representing the B. of L.E., B. of L.F. & E., and vari-

ous other Organizations of their desire to close North Toledo Yard, effective 11:00 P.M., July 10, 1955; closing this yard seriously affects agreements dated August 3, 1932, and May 1, 1948, by disrupting proper allocation interdivisional service between Michigan Central R.R. and The N.Y.C.R.R. Co., Lines West, as set forth in telegram this date."

On July 8, 1955, the Mediation Board wired plaintiff as follows (Plaintiff's Exhibit 4):

"We are advised that New York Central Management proposes to close the North Toledo Yard effective 11 PM, July 10, 1955. BLE and BLF&E state that service at North Toledo Yard as between Michigan Central and New York Central Lines West engineers is covered by agreement dated August 3, 1932, supplemented by memorandum of understanding effective May 1, 1948 and that closing of North Toledo Yard would seriously affect these agreements by disturbing agreed to allocation of service between the two Committees at Toledo Ohio. Organizations further claim that carrier has not complied with provisions of Section, Railway Labor Act in failing to serve formal Section 6 notice of their intention to close North Toledo Yard and have applied for Board's mediation services. Without passing on propriety of formal docketing of such applications, we have assigned correspondence file C-2386 to this dispute and Board hereby requests carrier to defer contemplated closing of North Toledo Yard until matter can be discussed with representatives of carrier and organizations by a Board representative. Please acknowledge and advise if this request will be complied with. Joint Horning, Brown, Gilbert and Kennedy. By direction of National Mediation Board."

Plaintiff wired the Mediation Board on the same day as follows (Plaintiff's Exhibit 5):

"Receipt acknowledged your telegram requesting we defer contemplated closing of North Toledo Yard until matter can be discussed with respresentatives of carrier and organizations by Board representative. We will comply with Board's request and hope Board will

act promptly in the matter since we do not want to delay the closing of this Yard indefinitely. Our General Manager, R. H. McGraw, in Cleveland and General Manager E. C. Johnson in Detroit will represent carrier and I suggest conferences in Toledo."

Thereafter, mediation efforts were carried on by the Board with plaintiff and defendants without success and, on August 1, 1955, the Board wired plaintiff as follows (Plaintiff's Exhibit 6):

"Re File C-2386 proposed closing of North Yard, Toledo, New York Central Lines. Board has considered position of organizations that carrier has not complied with provisions of Section 6, Railway Labor Act by failing to serve formal notice of intention to close North Toledo Yard, also present status as reported by Mediator. It seems clear that there is no agreement in effect between the carrier and any organization requiring maintenance of yards or other operating facilities and no request for such an agreement. In the absence of a formal notice for a rule covering such operations, Board does not have jurisdiction. Arbitrary changes, if any, in Memorandum Agreements of August 3, 1932 and May 1, 1948 covering allocation of services would constitute violation of those agreements and would be referable to National Railroad Adjustment Board. This Board is therefore unable to docket application of organizations and is closing its file C-2386. By order of the National Mediation Board. Joint Horning, Brown Gilbert, Kennedy, MacSwan."

On August 2, 1955, plaintiff notified its employees that the North Toledo Yard would be closed on August 7, 1955.

On August 4, 1955, defendants wired the Mediation Board as follows (Defendants' Exhibit F):

"This is to advise that BLF&E and BRT are setting strike date for 6:00 AM Eastern Standard Time Sunday August 7, 1955 New York Central West account management arbitrarily closing North Toledo Yard. BLF&E also setting strike date for same time on

Michigan Central. Please accept this wire as usual 72 hour notice in cases of this kind."

In reply to the above telegram, the Board wired plaintiff and defendants as follows (Plaintiff's Exhibit 8):

> "We are advised by the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen that those organizations have set strike date for six am Eastern Standard Time Sunday August 7 1955 on New York Lines West account management arbitrarily closing North Toledo Yard. Brotherhood of Locomotive Firemen and Enginemen also set strike date for same time of Michigan Central. Board hereby proffers its mediation services under provisions of Section Five First paragraph (B) under its Docket Case A-4923 and requests organizations to defer strike date pending mediation. Attention of all concerned is directed to status quo provisions of Section Six of Railway Labor Act. Please acknowledge."

On the same day, plaintiff wired the Board as follows (Plaintiff's Exhibit 9):

> "Receipt acknowledged your wire date Case A-4923. We will cooperate with mediation efforts of Board this Case."

Following extended efforts on the part of the Board with representatives of plaintiff and defendants, the Board sent to plaintiff and defendants the following telegram on December 16, 1955 (Plaintiff's Exhibit 17):

> "Reference is made to our Case No. A-4923 which covers a dispute between the New York Central Railroad, Lines West and the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen on the subject of proposed closing of the North Toledo Yard of this carrier. Mediation services of the Board were proffered in our telegram of August 4, 1955 based on a strike date set by the organizations for 6 a.m., EST. Sunday, August 7, 1955. This case has been the subject of mediation proceedings by

Board Member Francis A. O'Neil, Jr., but it has not been found possible to resolve the dispute in mediation.

"You are therefore notified that the National Mediation Board is closing its file in Case No. A-4932 as of this date.

"By direction of the National Mediation Board."

On January 17, 1956, plaintiff notified its employees in writing that the North Toledo Yards would be closed at 11:00 P.M., January 21, 1956, and, on January 19, 1956, plaintiff received a telegram from the Board, reading as follows (Plaintiff's Exhibit 13):

"Following wire received date from Messrs. Kennedy and Gilbert Quote Employees of New York Central Lines West as represented by Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Firemen and Enginemen authorized to withdraw from service in a legal strike effective 11:00 PM EST Saturday January 21 1956 account of New York Centrals Notice closing North Toledo Yard at that time Unquote".

On January 20, 1956, plaintiff filed its complaint and, on the same day, upon application therefor, the Court issued a temporary restraining order restraining defendants from initiating strike on the following day, and issued an order to show cause returnable on February 3, 1956. On this latter date, the case was presented to the Court on plaintiff's motion for a preliminary injunction and, by agreement of the parties, on its merits.

At the hearing, it was stipulated by the parties that, if called, certain of plaintiff's officials, to wit, Vice President Horning, General Manager McGraw and Superintendent Shea would testify as set forth in affidavits filed by plaintiff on the question of irreparable damages that would be sustained by plaintiff and by the public if the operation of plaintiff railroad would be discontinued because of the called strike. These affidavits recited, in effect, that un-

interrupted services of the employees represented by the defendant Brotherhoods are essential to the operation of plaintiff railway company; that the stoppage of operations would cause plaintiff thousands of dollars of damages daily, would require it to lay off approximately 2,516 employees in the Toledo terminal area, resulting in a total wage loss to said employees in excess of $34,800.00 for each day of said strike; that plaintiff would be compelled to embargo shipments into and out of the Toledo terminal area, thus depriving 207 industries in Toledo and vicinity of service by rail by plaintiff railway and would prevent interchange by plaintiff with The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, The Chesapeake and Ohio Railway Company, The New York, Chicago and St. Louis Railroad Company, and the Toledo Terminal Railroad Company, which serves 228 industries in Toledo and vicinity, that transportation of mail by rail into and out of Toledo through plaintiff's Central Union Terminal, approximating 15,582 sacks per day, would be halted, that such strike would paralyze all operations of plaintiff between Toledo and all points on its Western District, being the prinicipal lines of the plaintiff running from Buffalo to Chicago, and from Toledo to Charleston, West Virginia, necessitating the laying off of approximately 16,361 employees in addition to the employees of the Toledo terminal area, resulting in a total daily wage loss to said employees of approximately $231,575.00; that, in addition, it would seriously disrupt passenger operations and schedules of the Erie Railroad Company, The New York, Chicago and St. Louis Railroad Company and The Baltimore and Ohio Railroad Company, which use plaintiff's Cleveland Union Terminal, and would necessitate the laying off of approximately 1,177 employees of the Cleveland Union Terminal, with a daily wage loss of approximately $15,305.00; that such strike would seriously disrupt passenger train operations of The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company,

and the Wabash Railroad Company, which use plaintiff's Central Union Terminal at Toledo and those of the Grand Trunk Railway System, which uses plaintiff's South Bend, Indiana, passenger station, those of The Pennsylvania Railroad Company, which uses plaintiff's Erie, Pennsylvania, passenger station and those of The New York, Chicago and St. Louis Railroad Company, which uses plaintiff's LaSalle Street Station and trackage at Chicago; that it would seriously affect the passenger and freight operations of other railroads which have and use trackage rights over certain sections of the Western District, as well as the operations of connecting carriers; that it would stop service to approximately 2,180 industries located on the Western District, many of which are engaged in the manufacture of goods essential to our economy; that it would stop service to approximately 110 industries which do not have side-track connections but which utilize plaintiff's team track facilities at various locations in its Western District; that it would prevent plaintiff's Eastern District, being the principal lines between Buffalo and New York and Buffalo and Boston, from receiving cars from or delivering cars to plaintiff's lines in its Western and Northern Districts, which would necessitate disruption of train service in the plaintiff's Eastern District and result in laying off of numerous employees who would suffer a substantial wage loss.

The above testimony on the question of irreparable damage is uncontroverted in the record.

At the opening of the hearing, the Court granted the request of defendants to amend the answer by adding a new paragraph 28 stating that the complaint failed to state a claim upon which relief can be granted. Counsel for defendants then moved the Court to dismiss the complaint upon the basis of paragraph 28 of the answer. For the purpose of the motion, the Court acepted the allegations

of the complaint to be true, and these included paragraph 20 of the complaint, which reads as follows:

> "The threatened strike is called for the sole purpose of requiring the plaintiff to continue the operation of said two railroad yards, North Toledo Yard and Stanley Yard, when in the decision of the management of plaintiff, the operation conducted in the two yards can be so conducted as to close North Toledo Yard and thereby expediting and more efficiently rendering service to the public."

There can be no question but that counsel for defense, as well as for plaintiff, argued the motion on the basis that the threatened strike was called for the sole purpose of requiring the plaintiff to continue the operation of the North Toledo Yard.

On page 6 of the record, counsel for defendants, referring to the complaint, made the following statement:

> "For the purposes of this one motion as it stands, it is based upon the acceptance of the factual allegations contained therein."

On page 8, counsel for defendants made the following statement:

> "It is our position that in the railroad industry the right to strike is not prohibited by any statute. . . . Therefore, it is our position that the railroad Brotherhoods had a legal right to strike on January 21st without regard to statutory provisions, even for the sole purpose of preventing the closing of the North Toledo Yard.
>
> "Our second position is that that dispute over the closing of the North Toledo Yards, assuming there is nothing else involved in it, raises a labor dispute within the meaning of the Norris-LaGuardia Act so that the provisions of that Act attach."
>
> "THE COURT: You are maneuvering, then, into a situation where you rely upon the common law right to strike, is that correct?

"MR. HIGHSAW: That is correct.

"THE COURT: And you feel that at the same time the Norris-LaGuardia Act would forbid any Court from intervening and enjoining that right?

"MR. HIGHSAW: That is correct.

* * * * *

"THE COURT: You are discounting the existence of any agreement then.

"MR. HIGHSAW: We are discounting for this purpose, Your Honor, the existence of any agreement.

"MR. WARNER: May it please the Court, I think that at least in part Mr. Highsaw has helped, — — I mean the first part of his statement, — — has helped to narrow this down to the real issue, and that is whether or not the Brotherhoods have a right to strike solely because of the closing of the North Toledo Yard. * * *

"* * * The railroad asks the Court only that the employees and their representatives be enjoined from striking because of the closing of the yard." (R., p. 10).

On page 17 of the record, we find the following statement by counsel for defense:

"We want to bargain with you about that issue and we want to reach an agreement with you about that issue as to whether you close the yard or not, or if you close the yard maybe give us some other concessions in some other direction."

On page 23 of the record, we find the following statement by counsel for the defendants:

"We are now talking about collective bargaining over the continuance of the operation of the North Toledo Yard and a strike on behalf of the Brotherhoods to require the railroad to bargain with them about that. That is what it really amounts to, because up to now, Your Honor, the railroad has not sat down face to face across a table with these employees, and so much as said one word about this question of maintaining the North Toledo Yard."

On page 29 of the record, we find counsel for the defendants making the following statement:

> "MR. HIGHSAW: It is our position, Your Honor, that as to the authority of the railroad management to effect a physical change, namely, the closing of this yard, that that is a subject which the Brotherhoods have a legal right to negotiate with the management about, aside from these other questions."

On pages 31 and 32, we find the following:

> "THE COURT: (Interposing) Then it is the decision of the Brotherhoods that they want to participate in management problems, is that it?
>
> "MR. HIGHSAW: I say it is the position of the Brotherhoods, given this kind of a problem which they have here, that they can sit down and discuss and negotiate it."

On page 33, we find the following colloquy:

> "THE COURT: If your theory would prevail here, then anytime any railroad would want to make a change in its physical set-up and operation its directors would be required to sit down with the Brotherhoods, and come to an agreement on the propriety of that change; is that the position you are taking?
>
> "MR. HIGHSAW: Yes, Your Honor."

It appears uncontroverted in the record that the plaintiff was ready and willing at all times to discuss, negotiate, mediate or arbitrate with the defendants the problems growing out of the reallocation of work of the thirty-five employees involved in the North Toledo Yard and is still willing to do so at any time that defendants choose to consider the question; it appears further from the record that plaintiff has at all times fully cooperated with and followed all suggestions of the Mediation Board and the requirements of the Railway Labor Act. It appears further from the record that the defendants have filed no specific grievances or complaints with the National Railroad Adjust-

ment Board as suggested by the Mediation Board in its telegram of August 1, 1955 (Plaintiff's Exhibit 6), if it was concluded that arbitrary changes covering allocation of services would follow the closing of the Yard.

Assuming that the closing of the Yard does not raise a labor dispute, there appears to be no effective or proper available relief by any administrative agency open to plaintiff on the question of the closing of the Yard.

It is the position of defendants on their motion to dismiss the complaint that, first they have a common law right to strike regardless of any statutes, and particularly the Railway Labor Act, over the proposed closing of the Yard, and, second, that the Norris-LaGuardia Act forbids the Court to enjoin defendants from bringing about a strike or work stoppage.

Section 108 of Title 29 United States Code Annotated, (Norris-LaGuardia Act), reads as follows:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Section 113 (c) reads as follows:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

It is the position of plaintiff that the closing of the North Toledo Yard involves solely a question of manage-

ment decision with which defendants cannot concern themselves, and that if a collateral effect of such closing necessitates a reallocation of the work of certain employees that this presents a separate and distinct question that may later be subject to negotiation, mediation or arbitration.

We are of the opinion that the proposed closing of the Yard is a decision for management alone to make if, in the interest of efficiency of operation, service to the public or meeting competition, management should deem such a step advisable. We can envision any number of situations wherein management would decree a physical change in its method of operations either in its offices, its terminals, on its roadbeds, in its round houses, or in the operation of its trains, wherein the work of certain of its employees would be affected, and see no reason why management should be precluded from making these decisions in the interest of their company as well as of the public. Such decisions have been and are being made by public carriers as a matter of right and without consultation with their employees. To decree otherwise would bring about a violent disruption to our free enterprise system.

We are of the opinion that to initiate a strike that would cause irreparable damage to plaintiff, as well as to the public, on the grounds of a right to sit down and discuss and negotiate with management a proposed change in its physical set-up or its method of operation is placing the right to strike on an invalid ground, a ground that is untenable.

We do not agree with defendants that under the facts before us they have a common law right to strike regardless of statutes, for no permissible purpose appears.

In the case of Dorchy v. Kansas, 272 U.S. 306, at page 311, opinion by Mr. Justice Brandeis, we find the following:

> "The right to carry on business—be it called liberty or property—has value. To interfere with this right

without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. Compare Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, 143; Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. Compare People v. Barondess, 16 N. Y. Supp. 436; 133 N. Y. 649. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. Compare Aikens v. Wisconsin, 195 U. S. 194, 204-5."

We do not agree with defendants that plaintiff is precluded by the terms of the Norris-LaGuardia Act from appealing to the equity powers of the Court and seeking an injunction or that the Court, under the terms of the Act, is powerless to enjoin. We come to this conclusion because we believe that there is no labor dispute as defined by Section 113 (c) involved herein. Counsel for defendants have cited a number of cases wherein the Courts have felt bound by the terms and conditions of the Norris-LaGuardia Act after concluding that a "labor dispute" was involved. Typical of these cases is Diamond Full Fashioned Hosiery Co. v. Leader, et al., 20 F.S. 467 (D.C. E.D. Pa., decided September 10, 1937).

This is an opinion by District Judge Maris, now of the Court of Appeals, in which he decides that a hosiery company suit to enjoin a hosiery workers' union from picketing a closed mill of another hosiery company claimed to have locked them out of employment, from interfering with

a shipment to plaintiff of machines purchased from the second hosiery company is one involving or growing out of a labor dispute, and comes within the purview of the Norris-LaGuardia Act and he, therefore, declined to issue an injunction.

In this case there was no public carrier involved, no administrative procedure available for the settlement of the dispute such as the Railway Labor Act in the instant case, and there was no vital public interest at stake in determining the issue.

Courts are more concerned where the public interest is at stake in an effort to safeguard that interest.

In the case of Virginian Railway Co. v. System Federation No. 40, et al., 300 U.S. 515, at page 552, an opinion by Mr. Justice Stone, we find the following:

> "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Pennsylvania v. Williams, 294 U.S. 176, 185; Central Kentucky Gas Co. v. Railroad Commission, 290 U.S. 264, 270-273; Harrisonville v. W. S. Dickey Clay Co., 289 U.S. 334, 338; Beasley v. Texas & Pacific Ry. Co., 191 U.S. 492, 497; Joy v. St. Louis, supra, 47; Texas & Pacific Ry. Co. v. Marshall, 136 U.S. 393, 405-406; Conger v. New York, W. S. & B. R. Co., 120 N.Y. 29, 32, 33; 23 N.E. 983. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in induc-

ing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, Tobey v. Bristol, supra, enforce statutes commanding performance of arbitration agreements. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 119, 121; Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 278."

We conclude, therefore, that the position of plaintiff that there is no labor dispute involved in consideration of the motion to dismiss the complaint is sound, and that the motion ought to be, and is, overruled.

If the motion to dismiss the complaint is overruled, as has been done, defendants press the point that a certain agreement for the allocation of work at the North Toledo Yard entered into by plaintiff and the Michigan Central Railroad Company in the year 1932, and amended in 1948, is being violated, and the conditions thereof changed to the detriment of thirty-five employees involved at the North Toledo Yard, and that this is a direct and natural result of the closing of the Yard, and therefore, taken with the act of management in decreeing the closing of the Yard creates a labor dispute that brings the case within the terms of the Norris-LaGuardia Act and, therefore, precludes the Court from exercising injunctive powers.

The present dispute over yard service had its origin in the absorption by the plaintiff railway company of the operations of the Michigan Central Railroad Company and of the Toledo and Ohio Central Railroad. In 1930, the Michigan Central was leased to the New York Central. It is still operated by plaintiff as a leased line railroad. The Toledo and Ohio Central Railroad Company also became a leased line railroad of plaintiff in 1930 and, on February 13, 1952, it was merged into the plaintiff company.

Prior to 1930, the Michigan Central operated into Toledo from the north and its yard operations in the area were performed in the North Toledo Yard. Work in that

yard was performed by yard service crews employed by Michigan Central, whose job rights were set forth in agreements between the carrier and its employees. The leasing of the Michigan Central Railroad to plaintiff necessitated new agreements between them and their respective employees covering yard service within the Toledo Terminal area. Such agreement was negotiated and signed by the parties effective August 5, 1932 (Defendants' Exhibit J). This agreement was amended to some extent on May 1, 1948 (Defendants' Exhibit K).

After the lease of the Toledo and Ohio Central Railroad Company's lines into Toledo, a working agreement was entered into by plaintiff, whereby a division of work between plaintiff and T. & O. C. employees in connection with the Stanley Yard was effected. That agreement is still in effect.

With the closing of the North Toledo Yard, and the transfer of its activities to the Stanley Yard, a reallocation of the work of the employees at the North Toledo Yard is necessitated and this, of course, results in a clash of interests with employees serving the Stanley Yard.

Defendants feel that this situation raises a labor dispute which is directly attributable to the decision of management to close the North Toledo Yard and, therefore, creates a joint problem in which they have a right to participate and negotiate as a labor dispute in advance of the closing of the Yard.

The New York Central-Michigan Central agreement of August 5, 1932 (Defendants' Exhibit J) contains no requirement that plaintiff maintain the North Toledo Yards either in perpetuity or for any length of time. The agreement does not purport to give the employees a vested right in their jobs nor the right to them or their successors on the jobs of doing the work assigned at the time the agreement was entered into in the accepted fashion or in perpetuity. The Mediation Board found that there was no

agreement binding plaintiff to maintain the North Toledo Yard and, therefore, in effect, concluded that there was no labor dispute involved that would authorize it to assume jurisdiction. It further concluded that arbitrary changes, if any, in the agreement (J & K) would be referable to the National Railroad Adjustment Board. With these conclusions we agree. Defendants at no time asked for any change in the agreements nor for a new agreement, nor did they seek to appeal the decision of the Mediation Board to the National Adjustment Board as suggested by the Mediation Board.

If we concede that defendants are correct in their position that the attachment of the question of the effect of the closing of the North Toledo Yard to the decision of management to close the Yard makes a labor dispute, then we lay open for all time to come a method of circumvention of the designs of the Railway Labor Act whenever a decision of management requires a reallocation of the work of employees. We think that the adoption of such a course would be wrong. The closing of the North Toledo Yard may have the effect of requiring a reallocation of the work of thirty-five employees. If and when it does, that issue can and must be met, and it must be met in compliance with the requirements of the Railway Labor Act. The closing of the Yard as decreed by management is the initial step—that comes first. If and when the interests of the employees require attention as a result of the closing, then under the terms of the Railway Labor Act plaintiff and defendants are required to negotiate and, if necessary, carry the problem to the National Adjustment Board. We are not here concerned with the rights of the parties following a decision of the National Adjustment Board should the problem reach and require its attention.

We believe that a labor dispute cannot be found over the closing of the North Toledo Yard by seeking to incorporate in that action the anticipatory results upon the em-

ployees. The latter is a separate and distinct problem that may be met when the time arrives.

It is, therefore, the judgment of the Court that defendants have no right in any way to interfere with the closing of plaintiff's North Toledo Yard, and that a permanent injunction issue enjoining the defendants from conducting any strike, work stoppage or any other act of coercion to keep plaintiff from closing its North Toledo Yard.

In arriving at our conclusions we have been aided by the cases of Elgin, Joliet & Eastern Railway Co. v. Burley, et al., 325 U.S. 711 and The Chicago River and Indiana Railroad Company; et al. v. Brotherhood of Railroad Trainmen, et al., 229 Fed. (2d) 926.

Plaintiff may, within ten days, lodge with the Court findings of fact and conclusions of law drawn in accordance with this opinion, and defendants may, within ten days thereafter, file their exceptions or suggested additions thereto.

(signed) Frank L. Kloeb,
United States District Judge.

Toledo, Ohio.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

No. 7493 Civil

Judgment and Decree

Filed: June 4, 1956

The New York Central Railroad Company, Plaintiff,

vs.

Brotherhood of Railroad Trainmen, a Voluntary Association, et al., Defendants.

This cause came on to be heard on February 3, 1956, on plaintiff's motion for a preliminary injunction and by agreement of the parties, on its merits, was argued by coun-

sel and considered by the Court upon the evidence, the stipulations, the arguments and the briefs of counsel, and upon consideration thereof, and the Court having made and entered herein Findings of Fact and Conclusions of Law, and in conformity therewith and upon consideration of all of the issues herein, it is declared, ordered, adjudged and decreed that the plaintiff has a right to close its North Toledo Yard and that none of the defendants, nor any persons acting by, through or for them, or on their behalf, have any right in any way to interfere with the closing of said North Toledo Yard.

It is further ordered, adjudged and decreed that the defendants, and each of them and anyone acting by, through or for them, or on their behalf, be and they hereby are permanently enjoined and restrained from conducting any strike, work stoppage or any other act of economic coercion to keep or prevent plaintiff from closing its North Toledo Yard.

It is further ordered, adjudged and decreed that plaintiff have and recover from defendants, its costs herein expended.

Frank L. Kloeb,
Judge

Approved:

Doyle, Lewis & Warner
Milo J. Warner
D. L. Sears
W. A. Wilkinson
Attorneys for Plaintiff

Approved:

.....

.....

Attorneys for Defendants

It is certified that copies of the proposed Judgment and Decree filed herewith, have been furnished to opposing counsel.

D. L. Sears, Of Counsel
for Plaintiff

APPENDIX C

(Filed June 14, 1957)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12983

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., *Appellants*,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellee*.

APPEAL from the United States District Court for the Northern District of Ohio, Western Division

Decided June 14, 1957

Before MARTIN, McALLISTER and STEWART, Circuit Judges.

McALLISTER, Circuit Judge. The New York Central Railroad Company brought an action, seeking to enjoin the Brotherhood of Railroad Trainmen, a union, from conducting a strike because of the closing of one of the railroad yards, by the company, at Toledo, Ohio, and further asking for a declaratory judgment that the union had no right to interfere with the closing of the yard. The district court, after a hearing, in findings of fact, conclusions of law, and in a comprehensive opinion by Judge Kloeb, held that no labor dispute was involved, and granted the injunction sought, on the ground that such a strike would cause irreparable damage to the railroad, as well as to the public. *New York Central Railroad Company* v. *Brotherhood of Railroad Trainmen, et al.*, 140 F. Supp. 273.

The facts, insofar as pertinent to this controversy, are as follows: The strike was called to protest the closing of one of plaintiff's railroad yards. The National Mediation Board, which had sought to mediate in the case, found that there was no agreement between the carrier and any organization requiring the maintenance of the yard in question; that no request had been made, by the union, for such an agreement; that in the absence of such an agreement, the Board did not have jurisdiction; and that if any arbitrary changes were made in agreements covering allocation of services of the employees, such action would constitute a violation of those agreements, and would be referable to the National Railroad Adjustment Board. The district court, thereafter, found that there was no "labor dispute" between the parties; that, because of that fact, the Norris-LaGuardia Act, 29 U. S. C. A., Sec. 113, was not applicable, as that statute only came into operation to prohibit, under certain circumstances, injunctive relief in a labor dispute; and that the controversy giving rise to the instant case was not a labor dispute as defined in that Act.

Appellant union submits that the court erred in finding that the dispute between the parties did not involve a labor dispute within the meaning of the Railway Labor Act, Title 45 U. S. C. A., Sec. 151, et seq.; and that it further erred in finding that the controversy did not involve a labor dispute within the meaning of the Norris-LaGuardia Act, and that such Act did not bar injunctive relief in the instant case; and that the court erred in holding that appellee had no effective administrative remedy available to prevent the threatened strike; and that the district court did not have jurisdiction over the subject-matter of the action.

As to the question of irreparable damage, the uncontroverted evidence disclosed that uninterrupted services of the employees represented by the defendant Brother-

hoods are essential to the operation of plaintiff railway company; that the stoppage of operations would cause plaintiff thousands of dollars of damages daily, would require it to lay off approximately 2,516 employees in the Toledo terminal area, resulting in a total wage loss to said employees in excess of $34,800.00 for each day of said strike; that plaintiff would be compelled to embargo shipments into and out of the Toledo terminal area, thus depriving 207 industries in Toledo and vicinity of service by rail by plaintiff railway and would prevent interchange by plaintiff with The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, the Chesapeake and Ohio Railway Company, the New York, Chicago and St. Louis Railroad Company, and the Toledo Terminal Railroad Company, which serve 228 industries in Toledo and vicinity; that transportation of mail by rail into and out of Toledo through plaintiff's Central Union Terminal, approximating 15,582 sacks per day, would be halted; that such strike would paralyze all operations of plaintiff between Toledo and all points on its Western District, being the principal lines of the plaintiff running from Buffalo to Chicago, and from Toledo to Charleston, West Virginia, necessitating the laying off of approximately 16,361 employees in addition to the employees of the Toledo terminal area, resulting in a total daily wage loss to said employees of approximately $231,575.00; that, in addition, it would seriously disrupt passenger operations and schedules of The Erie Railroad Company, The New York, Chicago and St. Louis Railroad Company and The Baltimore and Ohio Railroad Company which use plaintiff's Cleveland Union Terminal, and would necessitate the laying off of approximately 1,177 employees of the Cleveland Union Terminal, with a daily wage loss of approximately $15,305.00; that such strike would seriously disrupt passenger train operations of The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company,

and the Wabash Railroad Company, which use plaintiff's Central Union Terminal at Toledo and those of the Grand Trunk Railway System, which uses plaintiff's South Bend, Indiana, passenger station, those of The Pennsylvania Railroad Company, which uses plaintiff's Erie, Pennsylvania, passenger station and those of The New York, Chicago and St. Louis Railroad Company, which uses plaintiff's LaSalle Street Station and trackage at Chicago; that it would seriously affect the passenger and freight operations of other railroads which have and use trackage rights over certain sections of the Western District, as well as the operations of connecting carriers; that it would stop service to approximately 2,180 industries located on the Western District, many of which are engaged in the manufacture of goods essential to our economy; that it would stop service to approximately 110 industries which do not have side-track connections but which utilize plaintiff's team track facilities at various locations in its Western District; that it would prevent plaintiff's Eastern District, being the principal lines between Buffalo and Boston, from receiving cars from or delivering cars to plaintiff's lines in its Western and Northern Districts, which would necessitate disruption of train service in the plaintiff's Eastern District and result in laying off of numerous employees who would suffer a substantial wage loss.

We proceed first to ascertain whether, under the Railway Labor Act or the Norris-LaGuardia Act, the controversy arising out of the railroad's closing its yard, constituted a labor dispute; whether under the circumstances of this case, the district court was barred by the provisions of the foregoing statutes, from issuing an injunction against the strike; whether the railroad had failed to resort to the administrative remedies available to it, to prevent the strike; and whether the district court had jurisdiction of the subject-matter of the action.

In calling the strike to protest against the closing and abandonment of one of the railroad's yards, the union was not seeking to exercise any labor rights against the railroad. True, the union objected because work would thereafter be reallocated among the employees of the yard in question. But the objection to the closing of the yard, concerning which there was no agreement between the railroad and the employees represented by the union, was, in our opinion, not a labor dispute within the meaning of the provisions of the Norris-LaGuardia Act. If the closing of the yard required a reallocation of the work of certain employees any controversy in this regard could be taken care of in accordance with the requirements of the Railway Labor Act. Under the provisions of that statute, both the railroad and the union are required to negotiate, and, if necessary, submit their differences to the National Railroad Adjustment Board. As Judge Kloeb remarked in his opinion: "We believe that a labor dispute cannot be found over the closing of the North Toledo Yard by seeking to incorporate in that action the anticipatory results upon the employees. The latter is a separate and distinct problem that may be met when the time arrives."

It is not every dispute between an employer and employees that justifies the right to strike. In *Dorchy* v. *Kansas*, 272 U.S. 306, 311, Mr. Justice Brandies, in discussing the circumstances which did not justify a strike said: "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist

that it be determined only by a court. Compare *Guaranty Trust Co.* v. *Green Cove R.R.*, 139 U. S. 137, 143; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. Compare *People* v. *Barondess*, 16 N. Y. Supp. 436; 133 N. Y. 649. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." Likewise, it would be unjustifiable for a union to prevail upon its members to strike for a reason unconnected with issues of representation, employment, bargaining or contractual rights. It is contended by the Union that the Railway Labor Act, Title 45 U. S. C. A., Section 151, et seq., is applicable to this case, in a certain respect, and precludes the court from issuing an injunction in this controversy, because of the requirement obliging appellee to exert every reasonable effort to settle the dispute in question with the union; and that such obligation to settle the dispute extends to the point of resorting to arbitration. The Railway Labor Act, insofar as pertinent to the argument of the union, provides machinery for the settlement of labor disputes. A "major dispute," as that phrase is known in the parlance of the Railway Labor Act, results when there is disagreement in the bargaining process for a new contract. A "minor dispute" is a controversy over the meaning of an existing collective bargaining agreement in a particular fact situation. The Norris-LaGuardia Act has been held to prevent the issuance of an injunction in a railway labor case involving a so-called "major dispute." *Brotherhood of Railroad Trainmen* v. *Toledo P. & W. R.R. Co.*, 321 U. S. 50. In such a case, of course, the Railway Labor Act does not provide a process for a final decision like that of the Adjustment Board in a "minor dispute" case. A minor dispute may be sub-

mitted to the National Railroad Adjustment Board by either party, and the award of the Board is final and binding on both parties; and a federal court can compel compliance with the provisions of the Railway Labor Act to the extent of enjoining a union from striking to defeat the jurisdiction of the adjustment Board, notwithstanding the provisions of the Norris-LaGuardia Act, since the two Acts are to be read together and the provisions of the Railway Labor Act cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act. *Brotherhood of Railroad Trainmen, et al.* v. *Chicago River and Indiana R.R. Co., et al.*, . . . U. S. . . ., (Decided March 25, 1957).

Here we are confronted by neither a major nor a minor dispute, within the meaning of the Railway Labor Act, nor any labor dispute within the meaning of either the Railway Labor Act or the Norris-LaGuardia Act. Since, in the instant case, there is no labor dispute involved, neither the Railway Labor Act nor the Norris-LaGuardia Act are applicable. Thus appellant's contentions that appellee should have exhausted the administrative remedies available to it in such a case, or resorted to arbitration is without merit, since such remedies are available only in cases involving labor disputes. Appellee has no administrative remedy to which it may resort, and is not required to arbitrate complaints which do not constitute "labor disputes." The provisions of the Railway Labor Act, 45 U. S. C. A. 152, First and Second, making it the duty of all carriers to settle all disputes arising out of the application of agreements concerning rates of pay, rules, and working conditions, or otherwise, does not require a carrier to arbitrate controversies that are not labor disputes, as contended by the union. As has been pointed out, the above provision of the statute recognizes two types of disputes arising between railway management and employees which may be adjusted thereunder, the first relating to disputes over formation of collective

bargaining agreements or efforts to secure them, looking to the acquisition of rights for the future, and the second, contemplating existence of a collective agreement or a situation in which no effort is made to change terms of employment and dispute, relates either to meaning or proper application of a particular provision with reference to a specific situation, or to an omitted case. *Murphree v. Brotherhood of Railroad Trainmen*, 173 Pac (2d) 926, 197 Okla. 627. "Broadly, the statute as amended marks out two distinct routes for settlement of two classes of dispute, respectively, each consisting of three stages. The Act treats the two types of dispute alike in requiring negotiation as the first stage towards settlement, and therefore, in contemplating voluntary action for both at this stage, in the sense that agreement is sought and cannot be compelled. To induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes." *Elgin, Joliet & Eastern Railway Co. v. Burley, et al.*, 325 U. S. 711, 724. The provision of the Railway Labor Act, above mentioned, does not contemplate any obligation on the part of the carrier to settle or arbitrate a controversy with a union that does not constitute a labor dispute. Neither the Railway Labor Act nor the Norris-LaGuardia Act bars the issuance of an injunction in the instant case.

We come then to appellant's contention that the district court did not have jurisdiction of the subject-matter of the action.

Many aspects of jurisdiction in similar cases have been ably discussed in *Toledo P. & W. R.R. v. Brotherhood of Railroad Trainmen, et al.*, 132 F. (2d) 265, (C. C. A. 7). In that case, a railroad had secured an injunction from the district court restraining a union from interfering with it by violence or threats of violence. The union had submitted among other defenses, that the fact that Congress had paramount power to legislate, in certain

fields, was not alone sufficient to confer jurisdiction on the district court simply because the railroad was an interstate carrier; and that the mere circumstance that interstate commerce was involved, and might be affected, were not sufficient to establish the jurisdiction of the court of a private suit seeking protection of such commerce. These are similar to the contentions that were raised by appellant union in the instant case on the question of jurisdiction. All of the objections to the jurisdiction of the district court in the *Toledo* case were the same as those of appellants in the present case, and were so ably and cogently stated and supported in a dissenting opinion by Judge Minton, later Mr. Justice Minton of the Supreme Court, that we freely draw upon his views in discussing the problem, in advance of our reference to the prevailing opinion of the court in that case. In his dissent, Judge Minton, at the outset, said that jurisdiction depended upon whether or not the controversy arose under the Constitution or laws of the United States, and that it was not a question whether Congress could have taken cognizance of that kind of controversy. The question, Judge Minton emphasized, was rather whether or not Congress had taken such cognizance. "To give jurisdiction," he declared, "the controversy must arise under the Constitution or laws of the United States." In the case before him he concluded that the controversy was based on the claim that the plaintiff had the right to conduct its business of interstate carrier free from interference and violence at the hands of its striking employees; that such right did not stem from the Constitution or any law of Congress and did not arise out of the interstate character of the business; that the right violated was a common-law right given by a state, and other states, through which the plaintiff's road ran, and could have been enforced in any one, or all, of such states. Judge Minton further declared that the fact that the plaintiff was engaged in

interstate commerce, and that some federal statutes imposed some duties pertaining thereto, was of no consequence on the issue of jurisdiction, and that such matters were only incidental. "A case, whose correct decision depends upon the construction of the Constitution or laws of the United States," said Judge Minton, "is what gives jurisdiction. The case at bar depends upon no construction of any part of the Constitution or laws of the United States. It seeks only the enforcement of a common-law right. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another, . . .' 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law upon the determination of which the result depends," citing *Gully* v. *First National Bank*, 299 U. S. 109, 112, 114. Judge Minton concluded his comprehensive opinion on the question of jurisdiction by observing that *McGoon* v. *Northern Pacific Ry. Co.*, 204 F. 998, 1001, 1005, laid down the proper rule: "When the complaint shows a case which arises out of a contract or a common-law right of property and only indirectly and remotely depends on federal law, such a case not only does not, but cannot properly, turn upon a construction of such law." Judge Minton considered, in the *Toledo* case, that the court was without jurisdiction, and that the case should be dismissed.

In the prevailing opinion of the court in *Toledo P. & W. R.R. Co.* v. *Brotherhood of Railroad Trainmen*, the Court of Appeals, speaking through Judge Lindley, after commenting on the provisions of the Interstate Commerce Act, 49 U. S. C. A., Sec. 1, et seq., went on to say that "From these provisions and others, it is clear that

a carrier in interstate commerce is bound, not only to furnish carrying facilities for anyone desiring them, but to supply 'necessary, proper, adequate and sufficient facilities.' " The court stated that, because of the activities of members of the union, the plaintiff was rendered unable to furnish such facilities and was delayed and prevented from operating. "Congress," said the Court, "has seen fit to impose certain duties upon a common carrier engaged in interstate commerce, and the failure to perform such duties subjects the carrier to liability. It cannot be that Congress imposed duties, and yet intended that the carrier should be denied federal relief from interference with carrying out such duties. Congress, having set up certain requirements which the carrier must meet, when others seek by violence to prevent it from meeting those statutory obligations, it should be permitted to seek protection in a court of equity of the sovereignty imposing the obligation." Further observations of the court are illuminating. It was remarked that in suits "arising under the Constitution or laws of the United States, or Treaties made, or which shall be made, under their authority," the proceedings of the Constitutional Convention had manifested "a settled purpose to include within the federal judicial jurisdiction all 'questions which involve the national peace and harmony' and that the word 'questions' includes every issue capable of a judicial determination;" and that the claim of the protection of the federal law, requiring its construction, or of a right or privilege given by a federal law, makes a federal question. The court declared that in cases where a federal statute imposes upon a private party, duties and obligations to be performed, the courts quite generally have approved jurisdiction in the district court of suits brought by such parties to prevent interference with the performance of their obligations under the federal statutes and under the Commerce Law; and that if interstate commerce traffic is hindered, delayed

and burdened to such extent as to amount to unlawful interference with such commerce, a cause of action exists calling for equitable relief. It was, therefore, held that the district court had jurisdiction of the subject-matter of the suit, or of the complaint praying for an injunction against the strike. Certiorari was thereafter granted by the Supreme Court in the *Toledo* case, and the judgment reversed on other grounds, the court expressly pretermitting the jurisdictional issue. *Brotherhood of Railroad Trainmen* v. *Toledo P. & W. R.R. Co.*, 321 U.S. 50, 54.

On this appeal, counsel for appellee, in support of their contention that the district court had jurisdiction of the subject-matter of the action, refer to the opinion of Mr. Justice Frankfurter in *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 450, in which it is said:

> "Almost without exception, decisions under the general statutory grants of jurisdiction strikingly similar to the constitutional wording, have tested jurisdiction in terms of the presence, as an integral part of plaintiff's cause of action, of an issue calling for interpretation or application of federal law. (*Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70.) Although it has sometimes been suggested that the 'cause of action' must derive from federal law, *it has been found sufficient that some aspect of federal law is essential to plaintiff's success. (American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260, 36 S. Ct. 585, 586, 60 L. Ed. 987. *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 577.) *The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not be remote, collateral or peripheral.*"

We are of the view that the district court had jurisdiction of the subject-matter of the action, and that, on its finding that the strike would result in irreparable injury to the public and to the railroad, it properly issued the

injunction. In arriving at this conclusion, although recognizing the forceful reasoning in the dissenting opinion, we concur in the views expressed on the jurisdictional issue, in the prevailing opinion in *Toledo P. & W. R.R. Co.* v. *Brotherhood of Railroad Trainmen*, supra, the conclusion therein being supported by numerous authorities. Some of the earlier cases are instructive in this regard. Of course they had their inception at a time long before the Railway Labor Act, with its beneficent provisions for the protection of railway employees, was conceived, and before the enactment of the Norris-LaGuardia Act, which protected employees, in general, engaged in interstate commerce in their right to strike in controversies involving labor disputes. But where a labor dispute does not exist, and where neither the Railway Labor Act nor the Norris-LaGuardia Act apply, which we here consider to be the case, and the court is confronted with the issue of federal jurisdiction to enjoin interference with interstate commerce, what has been formerly held, on the jurisdictional issue, is apposite. In *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 F. 730, Judge Taft, later Chief Justice Taft, sitting in the Circuit Court, held that the federal courts had jurisdiction of a bill in equity to restrain violations of the Interstate Commerce Act, to the irreparable injury of the complainant because of the subject-matter and without regard to the citizenship of the parties. In that case the Chief Executive of the Brotherhood of Locomotive Engineers was enjoined from promulgating any rule or order of the Brotherhood causing its members to refuse to receive, or handle and deliver, any freight cars in the course of transportation from one state to another, to the complainant, and to refuse to receive and handle such freight cars which had been hauled over complainant's road. Counsel for the defendants had contended that the interstate commerce law was only declaratory of the common law, which gave the same rights to complainant, and that

therefore, the case was not one of federal jurisdiction. Judge Taft observed that the bill invoked the chancery power of the court to protect the complainant in rights which it claimed under the interstate commerce law, which was passed by Congress in the exercise of the power conferred on it by the federal constitution to regulate commerce among the several states. "It is sufficient," said Judge Taft, "that congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States." In *Wabash R. Co.* v. *Hannahan*, 121 F. 563 (C. C. Mo.), it was held that a bill filed to enjoin railway employees from interferring, by a strike, with interstate commerce, was within the jurisdiction of the federal court. In the case of *In re Lennon*, 166 U. S. 548, a bill in equity had been filed to enforce compliance with the Interstate Commerce Act, and to enjoin the employees of a railroad company from refusing to receive from complainant railroad, freight cars for transportation over the lines on which such employees were working. The court held that the bill of complaint exhibited a case arising under the Constitution and laws of the United States, as it appeared to have been brought solely to enforce compliance with the provisions of the statute, and to compel defendant railroad and its employees to comply with such act by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant, for transportation over the other company's lines, any cars which might be tendered them. The court said that "a case arises under the Constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him, and the correct decision of the case depends upon the construction of such laws. As was said in *Tennessee*

v. *Davis*, 100 U. S. 257, 264: 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.'"

In the instant case the carrier sought protection from interference with its right, and the duty imposed by Congress upon railroad common carriers, to furnish facilities for passengers or freight, and to engage in interstate commerce, in the service of the public. Where such interference by strike over a controversy does not involve a labor dispute, and is not within the sanction of law, it may be enjoined to prevent great and irreparable injury to the public and to the railroad.

In this case, in our view, no labor dispute exists. A strike would interfere with appellee as a common carrier of interstate commerce, in the discharge of its duties which are imposed by federal law. The district court had jurisdiction over the subject-matter of the suit. A railroad strike involving a controversy which does not constitute a labor dispute, may be, and properly is, enjoined upon a showing that it will interfere with interstate commerce and result in irreparable injury to the public and to the railroad. As the district court found, the railroad and public are faced with great and irreparable injury. On the findings of the district court, it is our conclusion that the injunction was properly issued. In accordance with the foregoing, the judgment of the district court is affirmed.

STEWART, Circuit Judge, dissenting. "A vast and utterly unjustifiable part of federal litigation concerns only the question of jurisdiction, on which great time and labor and expense are expended before the merits of a question are ever reached."[1] Unjustifiable it may be,

[1] Jackson, Robert H. *The Supreme Court in the American System of Government*, Cambridge, Harvard University Press, 1955, page 37.

but the task of determining whether a controversy falls within the limited jurisdiction of the federal courts is an inevitable part of their judicial function.

In my view federal jurisdiction does not exist in this case. Citizenship of the parties is not diverse. The controversy certainly does not arise under the Constitution, and I cannot perceive that it arises under the laws of the United States. Believing that the complaint should be dismissed for want of federal jurisdiction, I do not reach the merits.

The reasons for my view are substantially the same as those expressed by Judge (later Justice) Minton, dissenting in *Toledo, P. & W. R.R.* v. *Brotherhood of Railroad Trainmen*, 132 F. (2d) 265, 272-274 (7 Cir., 1942). These reasons are fully set out in Judge McAllister's thorough discussion, and there is no point in reparaphrasing them here.

Judgment

(Filed June 14, 1957)

Appeal from the United States District Court
for the Northern District of Ohio

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.